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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

No. 116.

J. B. ORCUTT COMPANY, CHARLES DUNCAN, CHARLES H. DAUCHY COMPANY, and CHARLES DUNCAN, Trustee, in the Matter of Ingalls Brothers, Bankrupts, Petitioners,

vs.

CHARLES H. GREEN and the FULLERTON-POWELL HARDWOOD LUMBER COMPANY, *et al.*, Respondents.

BRIEF FOR THE PETITIONERS

CHARLES COWLES TUCKER,
J. MILLER KENYON,
REGINALD S. HUIDEKOPER,
Counsel for Petitioners.

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vs.

CHARLES H. GREEN AND THE FULLERTON-POWELL HARDWOOD LUMBER COMPANY, ET AL., Respondents.

BRIEF FOR PETITIONERS.

Statement of Facts.

This is a case involving the question of the refusal of the referee in bankruptcy to allow the filing of proof of three claims against the bankrupts' estate. The matter was certified by the referee to the District Court for the Northern District of New York, which court re-

versed the order of the referee. Subsequently the matter came before the Circuit Court of Appeals for the Second Circuit, upon appeal and petition for review, which said court reversed the judgment of the District Court and affirmed the order of the referee. The case is in this court upon a writ of certiorari issued to the Circuit Court of Appeals.

The facts of the case are as follows:

The Ingalls Brothers were adjudicated bankrupts on December 3, 1902. Charles Duncan was elected trustee. Within a few months after the adjudication the J. B. Orcutt Company verified its claim for $893.68, Charles Duncan verified his claim for $3,848, and the Charles H. Dauchy Company verified its claim for $3,535.67.

The claims of the Orcutt and Dauchy Companies were delivered shortly after their verification to Charles Duncan, the trustee, who, prior to June 1, 1903, delivered them with his individual proof to Henry W. Smith, Esq., who was his official attorney as trustee, but not his personal attorney, with instructions to file them with the referee, which Mr. Smith promised to do.

Shortly after receiving them, Mr. Smith told a clerk in his office to file such proofs of claim with the referee. Subsequently he asked the said clerk if he had filed them, and he said he had not; and Smith then directed said clerk a second time to file them immediately, and the clerk said he would do so. This was all before the expiration of a year after the adjudication. The said Smith's office was upset for a considerable time during the year by reason of repairs being made thereto.

Subsequently proofs of the three claims were presented to the referee for filing, each of said proofs being accompanied by a petition, dated April 2, 1904, for leave to file each of said claims *nunc pro tunc* as of a date prior to December 3, 1903, or for such other and further relief as may be just and proper.

Mr. Smith was not the attorney for any of said claimants, and none of them instructed him to withhold their claims from filing, or knew until more than a year after said adjudication that their claims had not been filed with the referee as they had directed.

The said Henry W. Smith admits that there is no legal liability for him to pay the amount of the claims which were disallowed by the referee, but he feels that morally he owes a duty to those whose claims have been thus disallowed, not to permit them to suffer on account of the neglect of a clerk in his employ.

The claims filed with the referee prior to December 3, 1903, aggregate about $10,000.00, and the estate is not large enough to pay them in full. The three claims in question aggregate somewhat above $8,000.00. Thus, without fault on their part, the owners of almost half the liabilities of the bankrupts find themselves wholly shut out from the distribution unless they can have remedy from this honorable Court. (Record, pp. 1–2.)

The three questions certified by the referee to the Court for review are as follows:

1. Does Section 57n, or any other provision of the Bankruptcy Act, limit the time within which a proof of claim may be filed to one year or any particular time after adjudication?

2. Am I compelled, or empowered, by General Order XXI (1), or otherwise, under the circumstances of this case, to permit a proof of claim to be filed with me subsequent to one year after adjudication *nunc pro tunc* as of a date within said year?

3. Should the relief asked by the petitioners have been granted? (Record, p. 4.)

The relief sought by these petitioners is that they should be recognized as creditors in the distribution of the bankrupt's estate, having filed their claims within the period of one year after adjudication.

ASSIGNMENT OF ERROR.

The United States Circuit Court of Appeals for the Second Circuit erred in reversing the order of the District Court, which reversed the ruling of the referee rejecting the claims of the appellant creditors of the bankrupt.

ARGUMENT.

POINT I.

There is no provision in the Bankruptcy Act which fixes the time within which proofs of claim must be filed.

The referee was under the impression that Section 57n of the Bankruptcy Act is mandatory in this regard, and he seems to have been entirely governed thereby in reaching his conclusion. The language of Section 57n is as follows:

> "Claims shall not be *proved* against a bankrupt estate subsequent to one year after the adjudication."

It will be seen that this subsection of the act does not limit the time within which a proof of claim must be *filed* with the referee, but merely limits the time within which claims must be *proved*.

There are three distinct steps prescribed by Section 57 of the Bankruptcy Act with respect to a claim against a bankrupt estate before it can share in dividends:

1. It must be proved.
2. It must be filed.
3. It must be allowed.

See *In re* Hornstein, 10 Am. B. R., 308–320.

Considering these three distinct steps in the inverse order, it will be noticed that subdivision (d) of Section 57, relating to the *allowance* of claims, provides:

> "Claims which have been duly proved shall be allowed, &c."

Subdivision (c) of Section 57 relates to the *filing* and provides that:

> "Claims after being proved may, for the purpose of allowance, be filed by the claimants in the court where the proceedings are pending, or before the referee, if the case has been referred."

Subdivision (a) of Section 57 relates to the proof of a claim and expressly defines the term proof of claims in the following language:

> "Proof of claims shall consist of a statement, under oath, in writing, signed by a creditor, setting forth his claim, the consideration therefor, and whether any, and, if so, what, securities are held therefor, and whether any, and, if so, what, payments have been made thereon, and that the sum claimed is justly owing from the bankrupt to the creditor."

If it is true, as contended for by the respondents that "proof of claims" includes "filing," then what is the meaning of the language of subdivision (c) above quoted? Does not this section contemplate two distinct acts, one the proving of the claim and one the disposition of the proof after the proof is complete? Subdivision (a) expressly defines what the "proof of claim" shall consist of, and leaves no room for the construction of that term. The term is expressly defined and limited to the doing of certain things. We emphatically deny the term as here used can require the doing of other things not included in the definition. That the term "proof of claim" does not include "filing" is shown by the case of *In re* Hornstein, *supra*, where, in the course of the opinion, the court, on page 320, uses the following language:

> "After liquidation (step one), they (claims) may be proved (step two), as required by Section 57a, and then filed for allowance (step three), and then allowed (step four)."

It is not to be presumed that Congress, after having carefully defined the word proved, as used in the Bankruptcy Law, and especially as used in Section 57 thereof, intended to use the same word in that very section with another and

broader meaning, embracing another word from which it is in the very section differentiated.

The referee admits that "as matter of first impression, the construction urged seems almost conclusively reasonable."

Not only is it reasonable, but *almost* conclusive. Why not quite? Two reasons only are urged by him; first, that it is absurd; and second, that courts have assumed the contrary.

The definition of "proved" in Section 57a has the sanction of positive law, and no matter what its absurdity, it exists as a fact. But the "absurdity" of the definition, or of assuming that Congress intended to follow its own definition, is not as alarming as it seems to the referee to be. He says there can be only "some purely speculative reason" for the existence of 57n if "proved," as there used, be thus defined. To be sure we can only speculate as to the motive of Congress in the selection of "proved" instead of "filed"; still it may be presumed to have done so advisedly and for the very purpose of leaving open a door for the prevention of hardship. The framers of the bill may well have reasoned that by proving his claim the claimant would manifest his intention to present it, and that ordinarily, and barring accident, filing would promptly follow proof; and that claimants should not, by force of statutory prohibition, be deprived of all protection in case by accident, without fault of their own, their claims should fail to reach the referee. It may be argued that by basing the limitation upon the proving, a door for

fraud would be left open. In what respect? What object could there be in withholding a claim? We can think of none, save the hope of preventing investigation. But that could not avail. Allowance must follow filing; and no claim can be allowed until creditors have opportunity to investigate and attack it. Moreover, a very potent check upon the holding back of claims for any purpose exists in the fact that the belated claim may be shut out from sharing in distribution; for there is no doubt that claims may be filed after dividends have been declared and paid, and that creditors who have been negligent in proving their claims take their chances of there being sufficient assets to make them good as to previously declared dividends.

If we are to speculate as to the genesis of Section 57n, it is more reasonable to presume that Congress employed the word "proved" deliberately for some such purpose as we have indicated, than that it intended to ignore its own definition.

The other bugbear which serves to deprive the learned referee of the courage of his convictions, is that the courts seem to have assumed in sundry cases, that "proved," as used in Section 57n, includes "filed," and that claims must be actually filed before the expiration of a year after adjudication.

In none of the cases which have heretofore been cited by counsel for respondent, and by the referee, is there a suggestion that the claim was verified within the year after adjudication, and left with the trustee, with directions to file them, but not filed until after the year had

expired. In fact the referee, in his opinion, says: "None of them (the decisions) specifically appear to have been predicated upon the precise state of facts disclosed here, *i. e.*, upon proofs verified within the year, but offered for filing thereafter."

Not only is this true, but it appears affirmatively, or by necessary inference from the facts stated, in at least five of the cases cited, that the claim was not verified within the year. In three other cases, it does not appear that the court even assumed that "proved" was not used in Section 57n with the precise meaning given in 57a; and in two others, no belated claim was under consideration.

Those cases are, therefore, only authority for the facts appearing therein, and whatever the courts have said or assumed in those cases, is *obiter* as to the question here under consideration.

The court, in the case of Hutchinson *vs.* Otis, 190 U. S., 552, held that it was proper to permit the filing of an amended proof of claim subsequent to one year after adjudication. In the course of the opinion it was said (page 555): "Proof of debt originally filed is admitted to have been defective. A substituted proof was filed by consent of the trustee more than a year after the adjudication, the facts having been agreed in the meantime and an appeal taken. It is argued that the allowance of the amendment is within Section 57n forbidding proofs subsequent to one year after the adjudication, etc. The construction contended for is too narrow."

It should be remembered that the bankruptcy act is

in derogation of the common right of a creditor to recover his debt from his debtor. Not only this, but the section under consideration (57n) undertakes to work a forfeiture of the creditor's right against the estate of his debtor if he fails to make proof of his claim within a prescribed period. As we have seen, this section reads, "Claims shall not be *proved* against the bankrupt estate subsequent to one year after the adjudication." By the contention urged by the respondents, the court is asked to change the language of this section so that it will read, "Claims shall not be *filed in court or with the referee* subsequent to one year after the adjudication."

This Court has said:

> "Forfeitures are not favored in the law. Courts always incline against them."
>
> Marshall *v.* Vicksburg, 15 Wall., 146.

> "When either of two constructions can be given to a statute and one of them involves a forfeiture, the other is to be preferred."
>
> Vattel, 29th Rule of Construction.
>
> Farmers and Mechanics National Bank *v.* Dearring, 91 U. S., 29.

The Court has also said, by Chief Justice Marshall:

> "Whatever the legislative power may be, its acts ought never to be so construed as to subvert the rights of property, unless its intention so to do shall be expressed in such terms as to admit of no doubt, and to show a clear design to effect the object."
>
> Rutherford *v.* Greene's heirs, 2 Wheat., 196.

We say that the language of the statute in this case is plain and must be followed, while the respondents say that the language at best is ambiguous and the court should place such meaning upon it as will give practical effect to it, notwithstanding such effect will work a forfeiture of the rights of the petitioning creditors and inure to the benefit of the respondent creditors. But if the meaning is ambiguous, such ambiguity should be resolved in favor of the petitioning creditors.

> "It is a useful and safe rule of construction to resolve any ambiguity or obscurity in a statute in favor of such a reading of it as will best meet the demands of natural justice, so far as that can be done without violence to settled legal principles."
>
> Plum *v.* City of Kansas, 101 Mo., 525.

The purpose of the Bankruptcy Act is to provide for equality in distribution among creditors and not to enforce forfeitures as against particular creditors. By placing the narrow construction upon Sec. 57n contended for by the respondents, a forfeiture of the rights of certain creditors will be enforced.

> "All statutes which encroach on the personal or property rights of the individual are to be construed strictly. It will be presumed, in the absence of express words or necessary intendment or implication, that a statute is not intended to interfere with or prejudice a private right or title. In this class are embraced all statutes which work a forfeiture or confiscation of the private property of a particular person or a particular class of persons."
>
> 26 A. and E. Ency. of Law, p. 661.

POINT II.

Granted that the Act limits the time within which proofs must be presented to one year after adjudication, it is sufficient if they be presented within that time to the trustee.

We admit that the allowance of a claim is undoubtedly the function of the referee, and that for the purpose of his consideration the proof must in some way come to him. It does not, however, follow that it must be delivered to him in the first instance. On the contrary the act itself prescribes by Section 57c:

> "Claims after being proved may, for the purpose of allowance, be filed by the claimants *in the court* where the proceedings are pending *or before the referee* if the case has been referred."

Here, therefore, by the specific terms of the act is another place where the proof of claims may be deposited by the claimants. Could it be doubted that those who had presented their proof of claims, within the year after adjudication, to the court, are entitled to have those claims passed upon by the referee for the purpose of allowance? Had the clerk of the court to whom the claims were presented neglected to deliver such proof of claims to the referee, within the year, should the claimants be deprived of their right to have claims allowed, according to the provisions of the act? Unquestionably not. The neglect of the clerk could not be imputed to them, and our contention is that claims may

also be delivered to the trustee, to be by him transmitted to the referee.

In the case of *In re* Woolf, 4 Am. Bk. Rep., 74, the court said:

> "It is not doubted that where an order has been actually made and through inadvertence of the clerk not entered at the proper time, the court may, in furtherance of justice, direct that the entry be made as of the date when it should have been entered; but the court is not vested with authority to make an order *nunc pro tunc*, except when the delay in making such order has resulted from some act of its own. In the language of the Supreme Court:
>
> "'Where the delay in rendering a judgment or a decree arises from the act of the court—that is, where the delay has been caused either for its convenience, or by the multiplicity or press of business, either the intricacy of the questions involved, or of any other cause not attributable to the laches of the parties, the judgment or the decree may be entered retrospectively as of a time when it should or might have been entered up.' Michell *vs.* Overman, 103 U. S., 64; Gray *vs.* Brignandells, 1 Wall., 627."

"The trustee is an officer of the court." Loveland on Bankruptcy (1st ed.), Sec. 144.

McLean *vs.* Mays, 7 Am. B'kcy Rep., 115.

In re Ryan and Griffin, 6 Nat. B'k Reg., 225.

The office of trustee is created by the act (Sec. 33); and while the trustee is named by the creditors, his ap-

pointment is subject to the approval or disapproval by the referee or by the judge, and he is removable by the judge only. (Gen. Order 13.) His duties are specifically prescribed by General Order 17, which, among other things, provides that in case the trustee shall neglect to file any report or statement which it is made his duty to file or make by the act, or by any general order in bankruptcy, within five days after the same shall be due, it shall be the duty of the referee to make an order requiring the trustee to show cause before the judge why he should not be removed from office. All accounts of trustees are referred, as of course, to the referee.

The last sentence of General Order 21 provides that: "Proof of debt received by any trustee shall be delivered to the referee to whom the case is referred."

Thus, the Supreme Court has made it the specific duty of the trustee to deliver to the referee all proofs of claims delivered to him and has, therefore, designated the trustee as a proper depositary for such proofs.

The trustee, being an officer of the court, his acts may well be said to be the acts of the court itself, and by filing a claim with him, it can very properly be said that the claim is filed in the court where the proceedings are pending as required by Sec. 57c of the Act.

But, it is said, this court had no power to impose such a duty uponthe trustee. This we deny.

> "Proofs of debt received by any trustee shall be delivered to the referee to whom the case is referred."

By the terms of this provision the Supreme Court has

undertaken to prescribe a specific duty of the trustee, the duty of delivering to the referee all proof of claims delivered to him; and by necessary implication, to designate the trustee as a third depositary for such proofs.

Section 30 of the act of July 1, 1898, provides:

> "All necessary rules, forms and orders as to procedure and for carrying this act into force and effect shall be prescribed, and may be amended from time to time by the Supreme Court of the United States."

This section of the Bankruptcy Act recognizes that great embarrassment would arise if it were attempted to carry into effect the act without fixing officers' duties more fully than they are therein prescribed.

The court has assumed under this general authority that it has the power to prescribe the duties of officers, in addition to those prescribed by the act, and has accordingly prescribed many such duties, as witness: General Orders, I, II, III, XII, XVII, XXIV, XXVI, and others. Section 51 of the act prescribes "duties of clerks." Other duties of clerks are prescribed by General Orders I, II and III.

Section 39 prescribes "duties of referee." Other duties of referees are prescribed by General Orders XII, XXIV and XXVI.

Section 57 of the act prescribes "duties of trustees." Other duties of trustees are prescribed by General Order XVII.

The provisions of General Order XXI (1) above referred to, stand on the same basis as the General Orders last referred to, and as far as these petitioners are con-

cerned it merely adopts a mode of procedure, in addition to those provided for in the act, which they may follow in order to have their claims reach the referee for allowance. The basis of the respondents' contention seems to be that the act having designated a form of procedure, in bringing their proof of claims to the referee, such form cannot be changed. They seem to overlook the settled rule of law that no one has a vested right in a specific mode of procedure, and so long as a different mode of procedure does not operate to impair existing rights it cannot be objected to.

That the petitioners had the right to file their claim within a year after adjudication cannot be doubted That they presented such proof of claims seasonably to the trustee with instructions to file them with the referee is admitted. That the trustee failed to carry out the duty imposed upon him by General Order XXI (1) is also shown.

In this connection it is well to call the court's attention to the language of Section 57c of the act, wherein it is provided that "claims after being proved *may*, for the purpose of allowance, be filed" in court or with the referee. While General Order XXI (1) provides that "Proof of debt received by any trustee *shall* be delivered to the referee," the language of Section 57c is not mandatory, but permissive only. It does not say that proof of claim "*shall*" be filed with the court or referee and nowhere else. Taken in connection with General Order XXI (1), which is mandatory in regard to the duty of the trustee as to the disposition of claims deposited with

him, we have a third depository for the procedure which claimants may adopt, and a mandatory duty imposed upon the third depository (the trustee) to present the proof of claims so left with him with the referee, in order that they may be allowed, and to prevent the very hardship which is now attempted to be enforced against them. It is quite true that the Supreme Court is not the legislative but the judicial unit of our tripartite form of Government, but neither can it be doubted that it has the power of enacting and enforcing rules of court for the restriction and benefit of those practicing therein. The power was conferred upon the Supreme Court in bankruptcy matters to prescribe "all necessary rules, form and orders as to procedure and for carrying the act into effect." (Sec. 30, Bankruptcy Act.) The only limitation upon this power is that the rules shall not be inconsistent with the act. Within that limit the rules have the force of positive law. As was said in the case of *In re* Scott, 3 Am. B. R., 625:

> "The general orders and rules promulgated by the Supreme Court in accordance with the statute (Section 30) are obligatory and binding upon the courts of bankruptcy. They confer rights as well as prescribe rules of practice."

The last sentence of General Order XXI (1) is not in derogation of Section 57c of the act, which provides that claims after being proved *may*, for the purpose of allowance, be filed by the claimants in the court or before the referee.

Upon examination of Section 57 of the act it will be

found that throughout all its subdivisions the words "shall" and "may" are used discriminately, the word "shall" being used in each case where the provision is mandatory. Moreover it is the cardinal rule of legal interpretation that the word *may* is not mandatory but is permissive only unless used when conferring power on public officers or bodies for public purposes, in which sense it unquestionably is not used in Section 57.

General Order XXI (1) is not inconsistent with Section 57 of the act but merely supplementary to the act, and since it relates merely to procedure would insure and not prevent compliance with the act.

The last sentence of General Order XXI (1) relating to matters of procedure and not being inconsistent with, but supplementary to, the act, is both as to the duties prescribed and to the procedure sanctioned well within the power of the Supreme Court of the United States, both inherently and as authorized by the Bankruptcy Act.

The Supreme Court having adopted that construction and prescribed such duty and procedure, who will gainsay it?

In the courts below counsel attempted to account for the existence of the final sentence of General Order XXI (1) as a survival of the general orders under the former Bankruptcy Act, to which it was pertinent, and suggests that it has, through carelessness, crept into the present rules, where it has no proper place. His surmise is interesting, it may or may not be true. It must, however, be assumed that the Supreme Court formulated the pres-

ent rule and used all its language deliberately and for a definite purpose. What that purpose may have been is probably immaterial, but may not be difficult to surmise. The court found broad general provisions in the act that claims might be filed with the court or referee, and that they must be filed (assuming that "proved" in Section 57n means "filed") within a fixed time. The act also provided for another officer, the trustee, with whom creditors would naturally come into more intimate relations than with either court or referee, and to whom it might be more convenient to deliver their proofs. In view of these facts the Supreme Court may well have considered that it would conduce to the convenience of creditors and upon the whole to the prompt and certain presentation of claims and, therefore, aid in "carrying the act into force and effect," to permit proofs to be handed to the trustee, taking care, however, to direct the trustee to transmit them to the referee.

The referee dwells upon the contention that "if any duty was imposed upon the trustee by General Order XXI (1), the trustee is at fault and the remedy of the petitioners is upon his bond."

Assuming that General Order XXI (1) did impose a duty upon the trustee, it is not clear that an action would lie upon the trustee's bond, which was given to ensure "the faithful performance of all his official duties as such trustee."

There may be a grave question whether a trustee, whose duty it is to transmit a paper to a specified person or place, does not faithfully perform such duty when he

in good faith entrusts the paper for transmission to a messenger upon whom he has a right to rely, as he certainly ought to have upon his official attorney.

Again, assuming that the trustee has failed to perform a duty imposed upon him, and the consequences of such failure may be relieved against by the court without imperiling the right of any creditor to his ratable share of assets as prescribed by the Bankruptcy Act, must not recourse be had to this remedy, rather than to the official bond of the trustee; and would this not be a complete defense to an action upon the bond?

Perhaps the most complete answer to the proposition of the referee above quoted is suggested by the word "if." "If any duty was imposed," &c.

The premise is hypothetical. In fact, the referee finds that no duty was imposed and, therefore, that there is no remedy against the trustee on his bond. But assuming that it is doubtful, should the petitioning creditors be put to the hazard of the doubt?

Should they be compelled to seek a doubtful remedy against the trustee on his bond, when this Court can grant them sure relief, without infringing on the rights of any one?

The referee does not go the length of denying equitable standing, but says instead, referring to General Order XXI (1): "If it does not impose a duty, creditors cannot rely upon it, since they were not justified in depending on mere volunteer action."

But how were the petitioners to know that the trustee, in taking their proofs, was a mere volunteer? The

Supreme Court has announced that he was not. Are laymen to be charged with greater wisdom than the court?

The referee does not deny the equity, but seems to think the court has no power to do equity in this particular case; that the unfortunate petitioners have no remedy, except such as may exist against a mere gratuitous bailee, for his negligence, and as the referee truly intimates, if that bailee be a mere volunteer, the prospect of recovery would be slim indeed.

It is submitted that the referee is wrong in his conclusion that even if the petitioners have no legal standing, the court has no power to and should give them no equitable relief. The petitioners should not be put to the hazard of an action on the trustee's bond, which, upon the contention of counsel and referee, would be fruitless, or of an action for damages against either the trustee or attorney, as bailee, the issue of which would be at least doubtful.

The fund is in court. No reason exists why every honest creditor should not be allowed to participate in it, except the statutory prohibition, and that, it is conceded, may in a proper case be relaxed.

It is submitted that this is a proper case.

POINT III.

But assume that the Supreme Court has mistaken the limitation of its power; and that the last sentence of G. O. XXI-1 is invalid; upon general principles of equity the order of the District Judge should be sustained.

The District Judge says rightly that "the equities are certainly with the creditor, and if possible his contention should be maintained."

Even the referee concedes that "the arguments appeal very stongly to the sense of justice."

This proposition seems too plain for argument, despite the claim of counsel that "if there was no duty imposed (upon the trustee or his attorney) then the creditors have done nothing to entitle them to any consideration, even from an equitable standing." They have equities quite outside the act or orders, or the duties thereby imposed upon officers or upon themselves. They have, so far as now appears, or as there has so far been occasion to consider, honest claims in amount nearly one-half the total indebtedness of the bankrupt estate. They ask nothing except to be permitted to receive their share of the assets; they seek to deprive other creditors of nothing to which they are justly entitled. This alone gives them equitable standing.

Counsel for appellants mistake the purpose of the Bankruptcy Act when they assume that it is devised for the exclusive benefit of diligent creditors. That is the purpose of judgment and execution, of sundry pro-

visional remedies, and has been an important feature of various State insolvency and general assignment laws. But to shut out creditors is contrary to the fundamental principles of the Bankruptcy Act, to wit, the ratable distribution of all the assets in payment of all the liabilities.

But these claimants have not been negligent. This is true even within the contemplation of the Bankruptcy Act. They verified their claims promptly, and seasonably attempted to start the proofs on the way toward allowance. Even though they believed the proofs must come to the hands of the referee within the year, they were not negligent. Even if the trustee and his attorney are regarded as messengers, it was not negligent for the claimants to entrust the proofs to their care. Business men cannot attend personally to every detail of their affairs. Mails and messengers must be employed and must be trusted.

The equitable standing of the respondents being established, is it still impossible to relieve them.

Aside from the power inherent in the court to afford equitable relief in appropriate cases, it has been frequently decided that such relief may be granted even where a date fixed by the Bankruptcy Act has lapsed.

In Matter of Towne, 10 Am. B. R., 284, it appeared that the creditor was misled by the omission of assets from the schedule prepared by the bankrupt, and so did not even verify his claim within the year. The referee refused to receive the proof, but was reversed by the district judge.

In re Wolff, 4 Am. B. R., 74, it was held that where performance of an act, required by statute to be done within a specified time, was by default of the court delayed beyond that time, relief might be granted.

See, also, Hutchinson *vs.* Otis, 190 U. S., 552, cited in Point I.

Among the particulars in which the Towne case, above cited, differs from the one at bar, is that the petitioner there sought to come in for payment only after other creditors should have been paid in full. For aught that appears that was all the relief needed. Such relief would not avail here, and more is sought and granted. This distinction, however, renders the case cited none the less applicable to illustrate the proposition that the court has power to grant equitable relief, appropriate, of course, to given circumstances.

Upon the hypothesis stated at the beginning of this point (Point III), namely, that the Supreme Court of the United States had no power to authorize the delivery of claims to the trustee, we submit that:—

The Supreme Court has promulgated a general order, under the supposed sanction of the statute, which both statute and order the public are presumed to know and obey, and creditors of a bankrupt, in reliance thereon, have delivered their claims to the trustee, only to discover after the year has elapsed, that the order upon which they relied was void.

The claimants had a right to believe they had performed their full duty in the premises when their proofs were placed in the trustee's hands.

If not, the last sentence of General Order XXI (1) is a snare. By it the Supreme Court of the United States says to the creditors:

> "You may file your proofs directly with court or referee, as the act provides, or, if more convenient to you, may deliver them to the trustee, relying upon our direction, hereby given to him, to transmit them to the referee."

It fails to add, as to the latter alternative: "But you do so at your peril."

There can be no clearer case of a court misleading a creditor to his injury. It is quite as strong as those of Towne and Wolff, above cited, and other cases in which great latitude has been allowed in furtherance of equity.

The referee says: "It was not misapprehension, but was carelessness which produced the trouble." And again, referring to the final sentence of General Order XXI (1): "Its existence is certainly unfortunate, and particularly to the petitioners, if their present plight is attributable to it. That, however, seems not to be at all the case, the proximate cause being mere carelessness, although not imputable to them."

The referee totally ignores the familiar rule that when an injury is attributable to two causes, without either of which it would not have happened, both are to be regarded as proximate causes.

It may be conceded that but for carelessness in the office of the attorney for the trustee, the referee would have received the proofs within the year. But if they had not been first delivered to the trustee such careless-

ness would not have become operative. And it must be assumed that but for the implied permission contained in General Order XXI (1) the proofs would never have been delivered to the trustee, but would have been filed directly with the referee within the year. The existence of the rule was as much a proximate cause of the default as was the negligence in the attorney's office.

In the Muskoka Lumber Co. case, 11 Am. B., R. 761, referred to by counsel before the Circuit Court of Appeals with expression of surprise that the district judge could have distinguished the two cases, no claim had been presented to any officer, or even verified, within the year; so that neither act nor rule had been complied with.

The only ground upon which the claim could have been received was that of equity; and that presented no very strong appeal to the discretion of the court; for the claim was not scheduled, and, therefore, would not be affected by the discharge of the bankrupt.

The Seff Case.

The case, "In the Matter of Abraham Seff," is not only an authority here, but is the only case, besides the one at bar, in which the precise questions here presented appear to have been considered.

As that case, decided by the district judge of the Southern District of New York in December, 1902, is unreported, and, in fact, no opinion appears to have been written, a certified copy of the record is appended hereto.

In that case the circumstances were, in all important particulars, identical with those at bar; indeed, the case of the present petitioners is in one respect stronger than in the Seff case, since a question arose there as to whether the proof had in fact been delivered within the year to the trustee.

In that case, as in this, the proof had been (so the court decided) delivered seasonably to the trustee, who failed to file it with the referee. In that case, as in this, the creditor offered the proof to the referee after the expiration of the year. In that case, as in this, the referee declined to accept it, alleging lack of power as the reason for his action, and the district judge reversed him.

In the Seff case, it does not appear that objection was made before the district judge. But the same was true as to the referee; still he denied the relief sought, and the presumption is that the district judge would also have denied it, if he had thought proper, even though no creditor objected.

It is respectfully submitted that the judgment of the Circuit Court of Appeals should be reversed.

CHARLES COWLES TUCKER,
J. MILLER KENYON,
REGINALD S. HUIDEKOPER,
Counsel for Petitioners.

APPENDIX.

UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

I, Thomas Alexander, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the writings annexed to this certificate have been compared by me with their originals on file and remaining of record in my office; that they are correct transcripts therefrom and of the whole of the said originals.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the Southern District of New York, this 4th day of May, in the year of our Lord one thousand nine hundred and four, and of the independence of the said United States, the one hundred and twenty-eighth.

[SEAL.] THOS. ALEXANDER, *Clerk.*

IN THE DISTRICT COURT OF THE UNITED STATES,

For the Southern District of New York.

In the Matter of Abraham Seff, Bankrupt. }

You will please take notice that we shall move this court, at a term thereof to be held in Room 16, Post-office building, in the city of New York, on the 5th

day of December, 1902, at 9:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard for a decision upon the annexed question certified to this honorable Court by Peter B. Olney, Esq., Referee in Bankruptcy, to whom the above-entitled matter was referred.

Dated December 10, 1902.

Yours, etc.,

WILMER & CANFIELD,
Attys. for the Bradstreet Co.

No. 49 Wall Street, Manhattan, New York City.

To Messrs. Stern, Singer & Barr,
Attorneys for the Trustee,
No. 309 Broadway, New York City.

IN THE DISTRICT COURT OF THE UNITED STATES,

For the Southern District of New York.

In the Matter of Abraham Seff, Bankrupt. } In Bankruptcy.

I, Peter B. Olney, one of the referees in said court in Bankruptcy, do hereby certify that in the course of proceedings in said cause before me the following questions arose pertinent to the said proceeding:

On or about the 4th day of November, 1901, one Abraham Seff was duly adjudged a bankrupt by the District Court of the United States for the Southern

District of New York, and at the said time said Seff was indebted to the Bradstreet Company in the sum of fifty ($50.00) dollars, as appears by proof of claim hereto annexed. That on the 23d day of October, 1902, the Bradstreet Company sent said claim to the trustee of said estate, Louis Goetting, Esq., care of Messrs. Stern, Singer & Barr, the trustee's attorneys, No. 309 Broadway, New York city. Said claim was returned by said Goetting or his attorneys with a statement that it should have been filed with the Referee in Bankruptcy, and that a filing fee of one dollar should have been paid therefor, and on the 7th day of November, 1902, said claim was sent to me as referee, No. 68 William street, together with the filing fee of one dollar, but I returned the said claim and filing fee on the ground that it had not been filed within one year after the adjudication in bankruptcy.

The trustee's office is not at No. 309 Broadway, but is at No. 78 Leonard street, New York city. No. 309 Broadway is the address of the attorneys for the trustee, Messrs. Stern, Singer & Barr, who received the claim and returned it to the Bradstreet company prior to the expiration of the year subsequent to the adjudication. It is claimed by the Bradstreet company as shown in the annexed affidavit, that the claim was filed with the trustee prior to the end of the first year after the adjudication of bankruptcy. Under the last part of Section 21 of the General Rule in Bankruptcy, it is provided as follows: "Proofs of debt received by any trustee shall be delivered to the referee to whom the case is referred."

It is further claimed by the Bradstreet Company that mailing the proof of claim of Louis Goetting, Esq., care of Messrs. Stern, Singer & Barr, his attorneys, No. 309 Broadway, was in fact filing the claim with the trustee. I, the referee, find that I have not the power to allow and file the claim, and I so order.

And the question is certified to the judge for his opinion thereon.

Dated New York City, New York, the day of November, A. D., 1902.

PETER B. OLNEY,
Referee in Bankruptcy.

IN THE DISTRICT COURT OF THE UNITED STATES,

For the Southern District of New York.

In the Matter
of
Abraham Seff, Bankrupt.

On reading and filing the notice of motion dated December 10, 1902, with the admission of Stern, Singer & Barr, attorneys for the trustee herein thereon; and the question relating to the filing of the proof of claim of the Bradstreet Company, certified to this court for its decision thereon, by Peter B. Olney, Esq., one of the Referees in Bankruptcy to whom the above-entitled matter was referred.

Now, on motion of Wilmer & Canfield, attorneys for the Bradstreet Company, the moving creditor herein, it is

Ordered, That the proof of claim of the Bradstreet Company be received and filed as of the date when delivered to the trustee.

Dated December 18th, 1902.

GEO. B. ADAMS,
U. S. D. J.

The claim will be received as of the date when delivered to the trustee.

G. B. A.